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Supreme Court of the United States

TERM, 194..

Number 847

HARVEY M. ALLISON, Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA, AND BRIEF IN SUPPORT THEREOF.

J. HARRY PERSHING,
Attorney for Petitioner.

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Pittsburgh, Pa.

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TERM, 194..

Number

HARVEY M. ALLISON, Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Harvey M. Allison, respectfully prays that the writ of certiorari issue to review a decision of the Superior Court of the State of Pennsylvania affirming the judgment and the sentence of conviction of petitioner in the Court of Quarter Sessions of Allegheny County, Pennsylvania, at No. 166 December Sessions, 1942, for unlawfully engaging in the practice of medicine and surgery, which said judgment of the Court of Quarter Sessions of Allegheny County, Pennsylvania, was upon appeal affirmed by the Superior Court of the State of Pennsylvania, and the record duly remitted to the lower Court, and afterwards on Petition for allowance of appeal to the Supreme Court of the State of Pennsylvania an order was duly made on September 23,

1944, dismissing the said petition for allowance, by which affirmance by the Superior Court of the State of Pennsylvania, the sentence imposed upon the petitioner by the Court of Quarter Sessions of Allegheny County, Pennsylvania, by which sentence the petitioner was sentenced to pay a fine of 6¼ cents to the Commonwealth of Pennsylvania, pay costs, and undergo an imprisonment of not less than six months or more than twelve months in the Allegheny County Workhouse, which sentence was on the same day suspended on payment of costs of prosecution forthwith with sentence of six to twelve months to Workhouse if there is any violation, the said defendant, your petitioner being allowed forty-eight hours to pay said costs, was affirmed by the said Superior Court of the State of Pennsylvania.

1. Short Statement of the Case.

Harvey M. Allison, petitioner herein and defendant in the Court below, was indicted, tried, and convicted for practicing medicine and surgery without a license pursuant to the Act of Assembly of the State of Pennsylvania approved the sixth day of August, 1941, Pamphlet Laws page 903. Harvey M. Allison was duly admitted as a physician, and a license was issued to the said Harvey M. Allison on January 21, 1915, granting him the right to practice two branches of medicine, massage and herbs. The said certificate of licensure is still in full force and effect and has not been revoked.

The testimony in this case discloses that on October 15, 1942, Dr. R. S. Davis, a practising dentist, and a graduate of the University of Pittsburgh, at the request of the Department of Public Education, made a visit to the office of Harvey M. Allison. Dr. Davis complained

of an ailment and requested the petitioner to make an examination. Dr. R. S. Davis further alleged that the petitioner proceeded to make a diagnosis, prescribed a treatment and gave certain herb compounds to Dr. Davis, for which the petitioner received $5.50. The petitioner subsequently re-examined Dr. Davis on November 15, 1942. In the course of the diagnosis, the petitioner used a stethoscope, examined the chest of Dr. Davis, and gave Dr. Davis the diagnosis. Harvey M. Allison made no representation or statements as to his specialty. The medicine given to Dr. Davis contained no harmful ingredients or alcohol. The medicine consisted of herbs.

The Commonwealth's contention is that the petitioner is a physiotherapist and, as such, is without authority to practice as a botanic physician; to treat, make a diagnosis, or collect a fee, unless under the direction of a registered or licensed physician. Although the petitioner was given a license by the Medical Licensure Bureau of the Commonwealth of Pennsylvania, to treat the sick by the use of herbs, this license is not now recognized by the present Department of Public Instruction. Dr. Davis, the agent of the Commonwealth, based upon the use of stethoscope, a diagnosis and prescribing herb compounds, filed a criminal information against the petitioner, charging the petitioner with the practicing of medicine and surgery without a license.

At the close of the case, a written motion for a directed verdict was filed, the same refused, and exception noted. The petitioner's requests for points were filed, and points one to five inclusive and point eight were affirmed, and points six and seven were refused. The jury found the defendant below guilty as indicted, and motions for new trial and in arrest of judgment were

filed and the same dismissed. An opinion was filed by the late Judge Park, and an appeal taken. This appeal was filed in the Superior Court and certiorari issued December 3, 1943, and on July 15, 1944, Judgment was affirmed in the Superior Court, and on July 26, 1944, the record was remitted to the lower Court. On August 28, 1944, a petition for allowance of appeal to the Supreme Court of the State of Pennsylvania was filed, and on September 23, 1944, an order was made dismissing the petition for allowance of appeal to the Supreme Court of the State of Pennsylvania, as appears from the record in the Superior and the Supreme Courts in the Prothonotary's Office in Pittsburgh, Pennsylvania.

The matters involved in connection with this petition for certiorari are as follows: Where a state statute regulates the practice of medicine and provides for the issuance of general and minor specialists' licenses which shall have equal standing in the eyes of the law, is the action of the Bureau of Medical Licensure in arbitrarily restricting the practice of the specialties and a discriminatory classification, a violation of the Fourteenth Amendment of the Federal Constitution?

2. The Indictment Below.

Allegheny County, ss.

THE GRAND INQUEST of the Commonwealth of Pennsylvania now inquiring in and for the body of the County of Allegheny, upon their oaths and solemn affirmations, respectively, do present, that Harvey M. Allison, late of the County aforesaid on the fifteenth day of October, in the year of our Lord one thousand nine hundred and forty-two, at the County aforesaid, and within the Juris-

diction of this Court, with force and arms unlawfully did then and there engage in the practice of medicine and surgery, and did pretend to a knowledge of a certain branch and branches of medicine and surgery, and did hold himself forth as a practitioner in medicine and surgery, and assume the title of doctor of medicine and surgery, and doctor of specific diseases, and to diagnose diseases and to treat diseases by the use of medicine and surgery and other means, and to sign death certificates and hold himself forth as able to do so, without first having fulfilled the requirements of the Act of the General Assembly of Pennsylvania entitled "An Act to amend Sections one, two, seven and thirteen relating to the right to practice medicine and surgery in the Commonwealth of Pennsylvania; and providing a bureau of medical education and licensure as a bureau of the Department of Public Education et cetera", approved the sixth day of August in the year of our Lord one thousand nine hundred and forty-one, Pamphlet Laws page nine hundred and three and without first having received a certificate of licensure from the State Board of Medical Education and Licensure in the Department of Public Education and Licensure in the Department of Public Instruction of this Commonwealth contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania. Russell H. Adams, District Attorney of Allegheny County. Sworn by me, Thomas A. Samosky, Foreman. Test Pro Respub. R. S. Davis, J. Young, Mrs. R. S. Davis, Joseph Stack.

3. Motion for Directed Verdict.

And now comes the defendant, Harvey M. Allison, by his Attorney, Alexander J. Bielski, Esq., and respectfully moves the Court to direct a verdict of not guilty, and assigns the following reason therefor: (1) Under the law and the evidence, the verdict as to the defendant, Harvey M. Allison, must be not guilty. Alexander J. Bielski, Attorney for Defendant. Refused. Exception noted. By the Court. (Filed August 13, 1943).

4. Defendant's Points.

And now comes Harvey M. Allison, defendant, by his attorney, Alexander J. Bielski, Esq., and files the following requests for points:

(1). A physician is an individual licensed under the laws of the Commonwealth of Pennsylvania to engage in the practice of medicine and surgery in any or in all of its branches.

(2). A physician is also a person skilled in the art of healing.

(3). The art of healing is the science of diagnosing and treating in any manner whatsoever of disease or any ailment of the human body.

(4.) That the use of herbs is a branch of medicine and one who practices the same is a botanic physician.

(5). That the practice of herbs or the use of herbs is a separate branch of medicine and not related in any manner whatsoever to physiotherapy.

(6). That under the certificate, being Defendant's

Exhibit "A", the defendant was entitled to treat the sick by the use of herbs.

(7). That if you find that the defendant practiced the use of herbs and that alone, the verdict must be not guilty.

(8). If you find that the treatment offered Dr. Davis was by means of spiritual faith or prayer, it is specifically exempted from the Act and your verdict should be not guilty. Alexander J. Bielski, Attorney for Defendant.

5. Verdict (filed January 20, 1943).

And now, to-wit: January 20, 1943, we the Jurors empanelled in the above entitled case, find the defendant Guilty with a recommendation of leniency. Thomas M. Burkett, Foreman.

6. Motion for Arrest of Judgment and Order of Court (filed January 22, 1943).

And now comes the defendant, Harvey M. Allison, by his Attorney, Alexander J. Bielski, Esq., and respectfully moves the Court to grant a rule upon the District Attorney of Allegheny County to show cause why the verdict rendered in the above entitled case should not be set aside, and assigns the following as reasons therefor:

(1). The verdict was against the evidence.

(2). The verdict was against the law.

(3). The verdict was against the weight of the evidence.

(4). Additional reasons will be furnished upon the transcribing of the testimony. Alexander J. Bielski, Attorney for Defendant.

ORDER OF COURT.

And now, to-wit, this 22nd day of January, 1943, the foregoing Motion having been presented in open court, upon motion of Alexander J. Bielski, Esq., Attorney for Defendant, a rule is hereby granted upon the District Attorney of Allegheny County to show cause why the verdict rendered in the above entitled case should not be set aside, and leave is hereby granted to file additional reasons within fifteen days after the transcribing of the testimony and the filing thereof in Court. By the Court, A. T. P.

7. Motion for New Trial and Order of Court (filed January 22, 1943).

And now comes the defendant, Harvey M. Allison, by his Attorney, Alexander J. Bielski, Esq., and respectfully moves the Court to grant a rule upon the District Attorney of Allegheny County to show cause why a new trial should not be had in the above entitled case, and assigns the following as reasons therefor:

(1). The verdict was against the evidence.

(2). The verdict was against the law.

(3). The verdict was against the weight of the evidence.

(4). Additional reasons will be furnished upon the transcribing of the testimony. Alexander J. Bielski, Attorney for Defendant.

ORDER OF COURT.

And now, to-wit, this 22nd day of January, 1943, the foregoing motion having been presented in open Court, upon motion of Alexander J. Bielski, Esq., Attorney for Defendant, a rule is hereby granted upon the District Attorney of Allegheny County to show cause why a new trial should not be granted in the above entitled case, and leave is hereby granted to file additional reasons within fifteen days after the transcribing of the testimony and the filing thereof. By the Court, A. T. P.

8. **Opinion and Order of Court (filed August 13, 1943). Park, J.**

The defendant was indicted, tried and convicted of practicing medicine without a license under the Act of 1941, P. L. 903.

The Commonwealth contended that the defendant engaged in the practice of medicine and surgery and pretended to have knowledge of medicine and surgery and held himself forth as a practitioner in medicine and surgery and assumed the title of Doctor of Medicine and Surgery and diagnosed diseases and treated diseases by the use of medicine and surgery, contrary to the Act of Assembly.

The defense was that the Pennsylvania Bureau of Medical Education and Licensure had issued to the defendant a license offered in evidence which read as follows:

COMMONWEALTH OF PENNSYLVANIA.
Massage and Allied Branches.

The Bureau of Medical Education and Licensure of the Department of Public Instruction does hereby confer upon Harvey Milton Allison the right to treat the sick by herbs and massage.

The license issued to those practicing massage and allied branches will not confer the right to apply any of these treatments except upon request of a person duly authorized and prescribe the same. Nor will it authorize the holder to practice pharmacy, dentistry, or osteopathy, or any other drugless method not specifically mentioned on the license, nor to treat persons sick with quarantineable diseases, nor to practice medicine by the use of drugs administered internally or applied externally.

In Witness Whereof we have hereunto set our hands and caused the Seal of said Bureau to be affixed at Harrisburg, the 21st Day of January 1915.

.....
President.

.....
Secretary.

The defendant contended also that the proper action to be taken would have been an action of revocation under Section 6 of the Act of 1911, P. L. 639.

We are convinced, after a careful review of the testimony, that the Commonwealth produced sufficient evidence to sustain the conviction of the defendant. There is no serious denial of facts as alleged by the Common-

wealth witnesses that the defendant did assume the title of Doctor, diagnosed diseases by the use of medicines.

The Medical Practice Act of 1941, Section 1(c) defines medicine and surgery to be "As used in this Act shall mean the art and science having for their object the cure of diseases of, and the preservation of the health of, man, including all practices of the healing art with or without drugs, except healing by spiritual means or prayer."

There is no doubt in our minds that the defendant did exceed the special license given to him by the Comwealth which evidence was believed by the jury in returning a conviction and that either or both actions might or could be taken with consistency under the Acts of Assembly either to revoke the special license granted under the Act of 1911 or to proceed criminally, as was done in the instant case, under the act of 1941. We believe that there is no inconsistency in either procedure. We are of the opinion that it would be prudent for the Bureau of Medical Eduction and Licensure of the Department of Public Instruction to revoke the special license granted the defendant for the reason that the defendant was convicted in our Court, which conviction was sustained by the Superior Court, In Re Commonwealth v. Allison, 103 Pa. Superior Court 140, and again convicted in our Court in another action which was sustained by the Superior Court in Re Commonwealth v. Allison, 132 Pa. Superior Court 606.

This, however, would have no effect upon the right of the Commonwealth in this case to proceed as it did.

Both motions for a new trial and for arrest of Judgment, dismissed.

ORDER.

And now, to-wit, August 13, 1943, both motions for a new trial and for arrest of judgment, dismissed. By the Court, A. T. P.

9. Sentence.

November 30, 1943, Defendant sentenced to pay a fine of 6¼ cts. to the Commonwealth, pay costs and undergo an imprisonment of not less than six (6) months or more than twelve (12) months in the Allegheny County Workhouse and stand committed. Eo Die, above sentence suspended in payment of costs forthwith with sentence of six (6) months to twelve (12) months to workhouse if there is any violation. Allowed forty-eight (48) hours to pay costs. By the Court, P.

10. Order of Court Fixing Bond and Directing Appeal Shall Act as Supersedeas.

And now, to-wit this 3rd day of December, 1943, it appearing to the Court that an appeal was filed from the above conviction and sentence to the Superior Court of Pennsylvania, upon motion of Alexander J. Bielski, Esq., and upon consideration thereof, the appeal filed shall act as a supersedeas upon the filing of bond in the sum of $1500.00 to be approved by the Court. By the Court, S.

Wherefore your petitioner prays that the writ of certiorari issue as aforesaid to the Superior Court of the State of Pennsylvania so that the record of the case may be brought before us forthwith for the purpose of review.

And your petitioner will ever pray, etc.

HARVEY M. ALLISON.

State of Pennsylvania }
County of Allegheny } ss.:

Before me, the undersigned authority, personally appeared Harvey M. Allison, who, being duly sworn according to law, deposes and says that the facts set forth in the foregoing petition are true and correct.

HARVEY M. ALLISON.

Sworn and subscribed to before me this 12th day of December, 1944.

A. J. EPSTEIN, *N. P.*

[SEAL] A. J. EPSTEIN, *Notary Public.*

My commission expires January 19, 1947.

ARGUMENT FOR PETITIONER.

1. The writ should be issued to the Superior Court of Pennsylvania so that the record of the case may be brought before this Court forthwith for the purpose of review as a gross injustice has been done by this prosecution.

2. Harvey M. Allison, the petitioner, had issued to him by the State of Pennsylvania through the Bureau of Medical Education and Licensure a certificate licensing him to act as a physician and to treat the sick by the use of herbs and massage. This was admitted by the Commonwealth at the trial.

3. This certificate is still in force and effect, and has not been revoked.

4. If this verdict and sentence stands it will effectually prevent Harvey M. Allison from obtaining a further living at his profession. This prosecution is destructive and annihilating in its nature and takes away vested rights. It is conceded that all his medicine consists of herbs.

5. The testimony discloses that petitioner has been practicing 43 years as of December 14, 1943, and had already acquired a vested and recognized right on January 21, 1915, when the petitioner was duly admitted as a physician and a license to him by the State of Pennsylvania granting him the right to practice two branches of medicine, massage and herbs.

6. The petitioner has no quarrel with the allopaths, homeopaths, or eclectics, and not even with the osteopaths, nor the optometrists, or any other class of doctors. He wants to practice as a herb doctor using the

vegetable pharmacopoeia, the materia medica of which contains some 2500 different herbs and vegetable material, and wants to practice strictly without interruption, except the proper supervision by the Commonwealth of Pennsylvania, that branch of physiotherapy known as massage.

7. He is no quack; he has spent an entire lifetime in his profession; he wants to be safeguarded and have guaranteed to him his constitutional rights to practice his profession, his already vested rights to follow his chosen mode of making a living.

8. As a matter of Equity this petitioner comes into this Court with clean hands and insists that he has never tried to do different than to treat the sick with herbs and massage, and insists even in the face of this prosecution, and therefore prays that his right in his profession be protected, and that he be safe in his daily profession, and that the writ of Certiorari issue to the Superior Court of Pennsylvania for the purpose of review.

J. HARRY PERSHING,
Attorney for Petitioner.